RECENT CASE NOTES

ADMIRALTY—CHARTER PARTIES—LIABILITY FOR DEMURRAGE.—Exportation of coal to Argentina, except under license issued by the Secretary of Commerce, was forbidden by a proclamation of July 9, 1917 (40 Stat. at L. 1683). Subsequently, the respondents chartered vessels of the libelant for the purpose of carrying on the restricted trade. The charter parties included demurrage provisions. Failure of the respondent to secure licenses, because the War Trade Board to whom the power to issue licenses had been transferred disapproved of the consignees, resulted in delay beyond the lay days. The libelant sued for demurrage. *Held,* that the libelant should recover. *The Marpesia* (1923, C. C. A. 2d) 292 Fed. 957.

Damages in the nature of demurrage are recoverable for unreasonable delay, even in the absence of an express provision in the charter party or bill of lading. *Middleton v. United States* (1923, E. D. S. C.) 286 Fed. 548; *Price v. Morse Ironworks & Dry Dock Co.* (1902, E. D. N. Y.) 120 Fed. 445. Such a recovery is limited to the actual pecuniary loss suffered. *The Conqueror* (1897) 166 U. S. 110, 17 Sup. Ct. 510. Express provisions for demurrage after the expiration of specified lay days create an obligation excusable only in exceptional cases. *Hagan v. Cargo of Lumber* (1908, E. D. N. Y.) 163 Fed. 657 (default of owner); *Crossman v. Burill* (1900) 179 U. S. 100, 21 Sup. Ct. 38 (*vis major*). And to come within a provision expressly exempting the charterer from demurrage liability under certain circumstances, the event provided for must be the proximate cause of the delay. *Romney Steamship Co. v. Archibald M'Neil & Sons Co.* (1921, D. Md.) 273 Fed. 287; *Actieselskabet Barford v. Hilton & Dodge Lumber Co.* (1903, S. D. Ga.) 125 Fed. 137. It has long been held that failure of the charterer to procure documents necessary for the shipping or landing of a cargo does not excuse delay. *Hill v. Idle* (1815, N. P.) 1 Starkie, 111; *Coast Steamship Co. v. Seaboard Transportation Co.* (1923, C. C. A. 1st) 291 Fed. 13. A provision exempting the charterer from liability for delay due to governmental regulation would probably be effectual in such a situation. See *Coast Steamship Co. v. Seaboard Transportation Co., supra,* at p. 18. The doctrine of frustration excuses performance of contracts where conditions arise which could not reasonably have been foreseen. *The Kronprinzessin Cecilie* (1917) 244 U. S. 12, 37 Sup. Ct. 490; Wright, *Impossibility of Performing Conditions in Admiralty* (1923) 23 COL. L. REV. 40. But it has no application in the instant case, since both parties knew that licenses were required for the proposed exportation of coal. For general discussions of demurrage, see Maclachlan, *Merchant Shipping* (5th ed. 1911) 578; Leggett, *Charter Parties* (1894) 500; Scrutton, *Charter Parties and Bills of Lading* (8th ed. 1917) 305; Abbott, *Merchant Ships and Seamen* (14th ed. 1901) 296.

ALIENS—CANCELLATION OF CERTIFICATE OF NATURALIZATION.—In a suit brought by the United States under Sec. 15, Act of June 29, 1906 (34 Stat. at L. 601) to cancel the defendant's naturalization certificate on the ground that it had been fraudulently obtained, in that he had not then had the intention to become a permament resident of the United States, it was shown that within five years after his nauralization. the defendant, a British born subject, went to South Africa to represent a New York firm; that he resided there ever since; that he stated an intention to return to the United States whenever recalled by his employer; that he voted and took an active part in local South African affairs; that in 1920 he made a short visit to the United States on a British passport. *Held,* that it was

not proved that the defendant had changed his domicile by that clear, unequivocal, and convincing evidence beyond reasonable doubt, which is required to cancel a grant of citizenship. *United States v. Knight* (1923, D. Mont.) 291 Fed. 129.

A naturalization certificate will be cancelled when obtained without exact compliance with the statutory requirements. *United States v. Ginsberg* (1917) 243 U. S. 472, 37 Sup. Ct. 422. Also if the applicant was not of good moral character. *United States v. Milder* (1922, C. C. A. 8th) 284 Fed. 571. Or if he has been guilty of fraud, as in obtaining naturalization while a member of the I. W. W. *United States v. Swelgin* (1918, D. Or.) 254 Fed. 884. Or when holding anarchistic views. *United States v. Stuppiello* (1919, W. D. N. Y.) 260 Fed. 483; *cf.* (1920) 29 YALE LAW JOURNAL, 561. During the war the courts cancelled the certificates of a number of Germans who expressed sympathy for the "fatherland" on the theory that this revealed a mental reservation when they renounced allegiance to the German Emperor at the time of naturalization. These decisions seem legitimate where the naturalization was recent and the disloyalty patent. *United States v. Kramer* (1919, C. C. A. 5th) 262 Fed. 395; *Schurmann v. United States* (1920, C. C. A. 9th) 264 Fed. 917. But when the naturalization occurred thirty or more years before, the retrogressive presumption indulged in by the court is explainable only on the grounds of excessive war zeal. *Cf. United States v. Darmer* (1918, C. C. W. D. Wash.) 249 Fed. 989; *United States v. Wursterbarth* (1918, D. N. J.) 249 Fed. 908; but see (1918) 28 YALE LAW JOURNAL, 84. Though five years' continuous residence prior to naturalization is required, mere temporary absence with intent to return does not break the continuity. *United States v. Jorgensen* (1916, W. D. Mich.) 241 Fed. 412; *United States v. Shanahan* (1916, E. D. Pa.) 232 Fed. 169; but see *In re Di Giovine* (1917, W. D. N. Y.) 242 Fed. 741; *United States v. Griminger* (1916, N. D. Ohio) 236 Fed. 285. Attempted naturalization in another country during such absence does break the continuity. *United States v. Simon* (1909, C. C. D. Mass.) 170 Fed. 680. Where a naturalized citizen within five years after the issuance of his certificate goes abroad to reside, unless solely to represent American business, or for health, education, or some special exigency, thus overcoming the presumption of expatriation, his certificate may be cancelled. *United States v. Ellis* (1911, C. C. E. D. La.) 185 Fed. 546. Actual return to the United States rebuts the presumption of expatriation created by the residence abroad. (1910) 28 Op. Atty. Gen. 504; *contra: United States, ex rel. Anderson, v. Howe* (1916, S. D. N. Y.) 231 Fed. 546; see (1922) 32 YALE LAW JOURNAL, 195. The reasonable attitude of the court in the instant case, though at variance with the reasoning of some of the decisions, seems to represent the desirable attitude toward the cancellation of citizenship papers. The defendant's recent acts might indicate an intent to expatriate, but the representation of American business suggests that the intent was not formed when naturalization was granted. For a discussion of fraud in naturalization, see Borchard, *Diplomatic Protection of Citizens Abroad* (1915) secs. 225, 228-230.

BILLS AND NOTES—MAKER'S DEFENSE TO UNMATURED NEGOTIABLE INSTRUMENTS—INJUNCTION AGAINST TRANSFER.—The plaintiffs executed promissory notes for electrical equipment sold by the defendants with an express warranty of fitness. The plaintiffs sought to enjoin the negotiation of the notes, alleging that the equipment as delivered was defective and that the defendants had fraudulently represented that they would deliver additional equipment. To prevent circuity, they also requested recoupment by way of counter-claim against the notes. *Held,* that the defendant's demurrer be sustained, since in the absence of an allegation of the defendant's insolvency, the remedy at law is adequate. *Howser Bros. v. Tonson* (1923, Ga.) 119 S. E. 313.

Where the maker's defense to a negotiable instrument is cut off by a transfer to

a holder in due course, he has a remedy at law against the transferor. *Bourke v. Spaight* (1909) 80 Kan. 387, 102 Pac. 253; 27 L. R. A. 519, note. But where the instrument is obtained by fraud, and is in the hands of a payee or a holder with notice, its negotiation will be enjoined unless the remedy at law is certain and complete. *Hodson v. Eugene Glass Co.* (1895) 156 Ill. 397, 40 N. E. 971; *Pere Marquette R. R. v. Bradford* (1906, C. C. W. D. Mich.) 149 Fed. 492; see *Wickwire v. Warner* (1920, 4th Dept.) 191 App. Div. 835, 182 N. Y. Supp. 165; *affirmed* (1922) 233 N. Y. 572, 135 N. E. 923. This relief is in the sound discretion of the court. 1 Pomeroy, *Equity Jurisprudence* (4th ed. 1918) sec. 221; 28 L. R. A. 577, note. The negotiation of notes issued without authority has been enjoined. *First National Bank v. Dodge Co.* (1916, C. C. A. 9th) 233 Fed. 74; *affirmed* (1917) 260 Fed. 758. So where the note is void. *Ritterhoff v. Puget Sound Nat. Bank* (1905) 37 Wash. 76, 79 Pac. 601 (forgery); *contra: Erickson v. First Nat. Bank* (1895) 44 Neb. 622, 62 N. W. 1078 (material alteration, but under N. I. L. no longer absolutely void). In such cases, the remedy really safeguards primarily the possible holder in due course. Injunction has also been granted where there has been a failure of consideration. *Zeigler v. Beasley* (1871) 44 Ga. 57; *Moomaw v. Fairview Cemetery Co.* (1897, Va.) 27 S. E. 489. Or breach of warranty. *Atkinson v. Cain* (1907) 61 W. Va. 355, 56 S. E. 519. Or breach of contract, especially if the parties agreed not to negotiate the notes until full performance. *Bridger v. Brett* (1918) 176 N. C. 683, 97 S. E. 32; *Hilton v. Bathold Realty Corp.* (1923, 1st Dept.) 206 App. Div. 498. In the last case there was no allegation of insolvency and the performance of the contract was guaranteed. Insolvency is often a controlling, though not an essential, factor in restraining the negotiation of the notes. *Yount v. Setzer* (1911) 155 N. C. 213, 71 S. E. 209; see *Ruff v. Copeland* (1911) 137 Ga. 56, 58, 72 S. E. 506; 2 High, *Injunctions* (4th ed. 1905) sec. 1128. Other factors also influence the court to grant equitable relief. *Pere Marquette R. R. v. Bradford, supra* (balance of convenience); *Zeigler v. Beasley, supra* (to avoid multiplicity of suits); *Ritterhoff v. Puget Sound Nat. Bank, supra* (to avoid harassment by suit and to perpetuate testimony); *contra: Aetna Explosives Co. v. Bassick* (1917, 1st Dept.) 176 App. Div. 577, 163 N. Y. Supp. 917 (mere convenience); see *Warnock Uniform Co. v. Garifolos* (1915, 1st Dept.) 170 App. Div. 674, 156 N. Y. Supp. 637. The injunction does not destroy the negotiability of the instrument which should be impounded to prevent transfer to a holder in due course. *Winston v. Westfeldt* (1853) 22 Ala. 760; *Carroll County v. Smith* (1884) 111 U. S. 556, 4 Sup. Ct. 539; 50 L. R. A. (N. S.) 871, note. The breach of warranty and the fraudulent partial failure of consideration in the instant case seems to present a suitable case for equitable relief. And the injunction offers the further benefit of protecting the maker from the sometimes heavy financial burden of being out of funds from the time he pays the instrument until he collects his indemnity. *Cf.* Spencer, *Suretyship* (1913) sec. 177.

CONSTITUTIONAL LAW—POLICE POWER—LIMITATION OF THE HEIGHT OF BUILDINGS.—Three actions were brought to test the validity of Wis. Laws, 1923, ch. 424, limiting the height of buildings throughout the state to 100 feet save in cities of the first class (Milwaukee) where the limit is 125 feet, contending that it took private property without compensation. One of the plaintiffs designed a building 100 feet high and planned to add another story but did nothing further. Another had entered into a contract for a 16-story building, of which eight stories were already built. The third had obtained a permit to erect a building 115 feet high, had torn down an old building, prepared plans, arranged for financing, but incurred no further expense. *Held,* (one judge *dissenting*) that the act was constitutional under the police power and should be applied to the first plaintiff; but not to the second or (three judges *dissenting*) to the third because they had

altered vested rights in reliance on the existing law. *Atkinson v. Piper* (1923, Wis.) 195 N. W. 544.

Limitation of the height of buildings for purely æsthetic purposes has not been sustained under the police power. *Piper v. Ekern* (1923) 180 Wis. 586, 194 N. W. 159; see COMMENTS (1920) 30 YALE LAW JOURNAL, 171; (1923) 23 COL. L. REV. 682. But such a purpose may be accomplished by eminent domain. *Attorney General v. Williams* (1899) 174 Mass. 476, 55 N. E. 77. And under the police power if it is also necessary for the public health or safety. *Welch v. Swasey* (1908) 214 U. S. 91, 29 Sup. Ct. 567; Dillon, *Municipal Corporations* (5th ed. 1911) sec. 696; see COMMENTS (1923) 32 YALE LAW JOURNAL, 833. The cases generally have involved either local ordinances or laws affecting one particular locality. *Welch v. Swasey, supra; Cochran v. Preston* (1908) 108 Md. 220, 70 Atl. 113; *Lincoln Trust Co. v. Williams Building Corp.* (1920) 229 N. Y. 313, 128 N. E. 209. The instant case goes farther in sustaining a blanket law for the state. The court suggests, that because a state may authorize cities to regulate the height of buildings, it may accomplish the same result directly. But what may be a reasonable and necessary regulation of private right in one community may be an arbitrary abuse of power in another. *Bonnet v. Vallier* (1908) 136 Wis. 193, 116 N. W. 885. The width of streets, the nature of the subsoil, the means of fire protection, and the character of the transportation systems are important in determining what is a reasonable regulation and any blanket statute is apt to be unreasonable as to a large body of citizens throughout the state. If the decision is to be supported, it must be on the familiar presumption of validity of the legislative determination of necessity. *Watertown v. Mayo* (1872) 109 Mass. 315; *Ex parte Quong Wo* (1911) 161 Calif. 220, 118 Pac. 714. And in any case the statute is inapplicable as against persons who have acquired what the court considers "vested" rights in reliance upon the existing law. *Cf. Dobbins v. Los Angeles* (1904) 195 U. S. 223, 25 Sup. Ct. 18.

CRIMINAL LAW—ENTRAPMENT TO SELL LIQUOR.—A sheriff to entrap the defendant sent one McClung to buy liquor for him. The defendant had no liquor in his possession but secured some for McClung who paid for it. The defendant was convicted in the trial court of selling intoxicating liquor in violation of the statute. On appeal he claimed as error an instruction that the entrapment was no defense and a refusal to instruct that, if the defendant was acting as the agent of the buyer and not of the seller, he was not guilty. *Held,* (two judges *dissenting*) that the entrapment was no defense but that the cause should be remanded for error in not giving the requested instruction. *Whittington v. State* (1923, Ark.) 254 S. W. 532.

If the defendant has no prior intention of committing a crime and is induced to do so by officers of the law or their agents, the entrapment is a defense to a prosecution. *Shouquette v. State* (1923, Okla.) 219 Pac. 727; see *Butts v. United States* (1921, C. C. A. 8th) 273 Fed. 35; NOTES (1924) 4 VA. L. REV. (N. S.) 319. But an inducement to do what the officers reasonably believe the accused would do voluntarily is never a defense. *Chicago v. Brendecke* (1912) 170 Ill. App. 25; *Hummelshime v. State* (1915) 125 Md. 563, 93 Atl. 990. This is true even if the inducement was solely for the purpose of prosecuting the defendant. *Goldstein v. United States* (1919, C. C. A. 7th) 256 Fed. 813. Colorado cases to the contrary seems to be in the nature of civil actions by cities to recover penalties for violation of ordinances prohibiting the sale of liquor. *Walton v. Canon City* (1900) 14 Colo. App. 352, 59 Pac. 840; *People v. Chipman* (1903) 31 Colo. 90, 71 Pac. 1108. New York has even held that one who receives goods believing them to be stolen has a valid defense if the owner of the goods has permitted the supposed thief to take them. *People v. Jaffe* (1906) 185 N. Y. 497, 78 N. E. 169;

but see *People v. Du Veau* (1905, 1st Dept.) 104 App. Div. 381, 94 N. Y. Supp. 225. It is often said that if the acts of entrapment furnish a consent and if the defendant's wrong is one for which consent is an excuse, there can be no conviction. *People v. McCord* (1889) 76 Mich. 200, 42 N. W. 1106 (burglary); *State v. Loeb* (1916, Mo.) 190 S. W. 299 (rape). But in such cases the consent itself is the operative defense irrespective of the manner in which it arises. See *Love v. People* (1896) 160 Ill. 501, 43 N. E. 710. In the instant case consent is immaterial. See *Moss v. State* (1910, Okla. Cr.) 111 Pac. 950. But where the defendant acts as agent for the buyer, he cannot be convicted of selling liquor. It is a question of fact whether he acts in good faith only for the buyer, or merely pretends so to act as a subterfuge to evade the law. See *Snead v. State* (1918) 134 Ark. 303, 203 S. W. 703.

EQUITY—CANCELLATION OF CONTRACTS—ADEQUACY OF LEGAL REMEDY.—A life insurance policy was incontestable after one year. Within the year the insured died and the insurer brought suit in equity in the federal court for cancellation of the policy for fraud at the inception of the contract. Thereafter, within the year, the beneficiary brought an action at law on the policy which was removed to the same court. By a supplemental bill the insurer sought to enjoin the action at law. *Held,* (one judge *dissenting*) that it was the duty of the court to hear the suit in equity first. *Jefferson Life Ins. Co. v. Keeton* (1923, C. C. A. 4th) 292 Fed. 53.

Fraud and illegality in the inception have always been defenses to an action at law on a simple contract. Nevertheless, equity "cancelled" the contract, as the evidence to establish the defence might be lost. *Newman v. Franco* (1795, Exch.) 2 Anst. 519; *Buxton v. Broadway* (1878) 45 Conn. 540. Some American courts refused this relief, since the remedy at law was adequate and the evidence could be preserved by a bill to perpetuate testimony. *Allerton v. Belden* (1872) 49 N. Y. 373. Others while normally giving relief refused it if an action at law had been begun prior to the suit in equity, or even immediately afterward, as in the principal case. *Grand Chute v. Winegar* (1872, U. S.) 15 Wall. 373; *Hoare v. Bremridge* (1872) L. R. 8 Ch. App. 22. Some of the cases preferred the common law action because it was more speedy, less costly, and allowed the evidence to be taken orally,—reasons which do not apply to-day. *Hoare v. Bremridge, supra.* Since the Act of March 3, 1911 (36 Stat. at L. 1163) providing that suits in equity shall not be sustained in any court of the United States in any case where a plain, adequate and complete remedy may be had at law, the federal courts have refused to entertain suits for cancellation. *Cable v. U. S. Life Ins. Co.* (1903) 191 U. S. 288, 24 Sup. Ct. 74; *Bronson v. Cook* (1917, N. D. Ga.) 247 Fed. 601. But they have given relief in the case of negotiable instruments which were in danger of being transferred to a bona fide purchaser. *Pere Marquette R. R. v. Bradford* (1906, C. C. W. D. Mich.) 149 Fed. 492. Or to prevent a multiplicity of suits. *Louisville Co. v. Ohio Co.* (1893, C. C. D. Ky.) 57 Fed. 42; see (1924) 33 YALE LAW JOURNAL, 553. The right to a trial by jury is often the main issue especially in the insurance cases. But since the right to a jury trial is only preserved as it was at common law, it seems that the jurisdiction of equity is not unconstitutional in cases where the chancellor took jurisdiction from earliest times. U. S. Const. Amend. VII. The instant case is probably the type in which it is more desirable to have the evidence passed upon by a jury, but the court thought the legal remedy inadequate on the ground that the defense would be lost at the end of the year because of the incontestable clause. Perhaps the better rule is that the clause ceases to be operative at the death of the insured. *Jefferson Life Ins. Co. v. McIntyre* (1922, S. D. Fla.) 285 Fed. 570; *Mutual Life Ins. Co. v. Stevens* (1923, Minn.) 195 N. W. 913. Such a rule would lead to a contrary decision

on the question of equity jurisdiction. And the danger that the beneficiary might dismiss his legal action and deprive the defendant of its defense could be met by the suggested rule that there is no right to dismiss where it would cause prejudice to the other party. See *Stevens v. The Railroads* (1880, C. C. W. D. Tenn.) 4 Fed. 97.

EQUITY—INJUNCTION TO ABATE A NUISANCE—OVERHANGING STRUCTURE.—The defendant's building, six years after construction, was discovered to have tipped so as to encroach two inches in the space above the plaintiffs' premises, and press against their building. Despite notice to the defendant, he took no action and the encroachment progressively increased for almost five years. Actions for trespass to real property were required to be brought within three years, and those to recover possession within five. Calif. C. C. P. 1872, secs. 318 and 338. The plaintiff sought an injunction, and appealed from a judgment for the defendant. *Held,* reversing the judgment, that the encroachment was a continuing trespass and nuisance, giving rise to successive causes of action until abated, and that the plaintiff's remedy was not barred by the statute of limitations. *Kafka v. Bozio* (1923, Calif.) 218 Pac. 753.

By the modern view the extent of a landowner's interest in the air above his land is merely a privilege of reasonable user. Pollock, *Torts* (11th ed. 1920) 351; (1923) 23 COL. L. REV. 402, 403. Trespass for an interference with possession lies for an invasion above but near the surface. *Hannabalson v. Sessions* (1902) 116 Iowa, 457, 90 N. W. 93. Where the encroachment is more than transitory, some courts allow ejectment, based on the sheriff's power to remove the offending structure. *Rasch v. Noth* (1898) 99 Wis. 285, 74 N. W. 820; *Butler v. Frontier Tel. Co.* (1906) 186 N. Y. 486, 79 N. E. 716; COMMENTS (1917) 27 YALE LAW JOURNAL, 265. Others regard it as only an interference for which a petition in equity to abate a nuisance is the suitable remedy. *Crocker v. Manhattan Life Ins. Co.* (1901, 1st Dept.) 61 App. Div. 226, 70 N. Y. Supp. 492; *Norwalk H. & L. Co. v. Vernam* (1903) 75 Conn. 662; 32 L. R. A. (N. S.) 1010, note; 1 Tiffany, *Real Property* (2d ed. 1920) 864, 865. The importance of the distinction becomes apparent in cases of continuous or "recurring" trespass. Some states permit successive actions, and a prescriptive right is not acquired at the expiration of the term for the recovery of possession. See *Hunt v. Iowa Cent. R. R.* (1892) 86 Iowa, 15, 52 N. W. 668; *Peck v. City of Michigan* (1898) 149 Ind. 670, 683, 49 N. E. 800, 804. Generally, successive actions are allowed only when the injury is not "permanent," and future damages are incapable of assessment. *St. Louis, I. M. & S. Ry. v. Anderson* (1896) 62 Ark. 360, 364, 35 S. W. 791; *Ridley v. Seaboard R. R.* (1896) 118 N. C. 996, 24 S. E. 730. Legislative sanction of the encroachment, its character, and the inability of the tort feasor to repair the injury without committing another trespass have been used by the courts as tests of "permanence." *Troy v. Cheshire R. R.* (1851) 23 N. H. 83; *Kansas Pacific Ry. v. Mihlman* (1876) 17 Kan. 224; (1919) 29 YALE LAW JOURNAL, 240. Where the injury is held not to be "permanent," recovery may be had for the damage within the statutory period applicable, but not for prior damage. *Knapp v. N. Y., N. H. & H. R. R.* (1903) 76 Conn. 311, 56 Atl. 512. The majority of states allow a prescriptive right dating from the original delict, and all causes of action for damages thereafter arising out of the maintenance of the encroachment are barred. *James v. City of Kansas* (1884) 83 Mo. 567; *Valley Ry. v. Franz* (1885) 43 Ohio St. 623, 4 N. E. 88; 10 L. R. A. 210, note; 2 Wood, *Limitations* (4th ed. 1916) 846. There seems no reason, however, why causes of action arising before the expiration of the prescriptive period should not remain. See 1 Wood, *op. cit.* 327. Where the injury is progressively increasing, the right is only to maintain the encroachment as it was at the inception of the prescriptive period. *Western Union Tel. Co v. Moyle* (1893) 51 Kan. 203, 32 Pac. 895; see *Thompson v. Penn-*

sylvania Ry. (1888) 45 N. J. Eq. 870, 14 Atl. 897. Since the instant case was a suit in equity the court might have balanced the convenience before restraining the defendant, who had not yet acquired a prescriptive right. But as the plaintiffs were gradually being entirely deprived of the enjoyment of their land, without commensurate benefit to the defendant or society, the injunction properly issued. See NOTES (1922) 36 HARV. L. REV. 211; (1923) 33 YALE LAW JOURNAL, 205.

LEGAL ETHICS—DISBARMENT FOR FRAUD—SECURING DISMISSAL BY MISREPRESENTATION TO THE COURT.—The defendant, an attorney, defended a suit in which there were three opposing counsel of record. A fourth counsel engaged by the plaintiff in that suit after the commencement of the action, did not enter his name as counsel, but filed written pleadings and argued a motion, so that the defendant knew he had actually superseded the counsel of record. The defendant gave notice of a proposed order to the counsel of record only, and by representation to the master that the fourth counsel was not in the case, obtained an order dismissing the action. Disbarment proceedings were brought against the defendant. *Held,* (one judge *dissenting*) that the defendant was guilty of professional misconduct, and should be disbarred. *People v. Brillow* (1923, Ill.) 140 N. E. 829.

The power to disbar an attorney for professional misconduct is cautiously exercised, and only upon grounds which would render his continuance in practice subversive of the proper administration of justice. *Wernimont v. State* (1911) 101 Ark. 210, 142 S. W. 194. Where a fraud is wilfully imposed upon the court, the penalty is dependent upon the seriousness of the charge and the circumstances of each particular case. Where a merely misleading affidavit was introduced, the penalty was limited to suspension. *In re Wagener* (1914, 1st Dept.) 161 App. Div. 546, 146 N. Y. Supp. 589. Similarly for concealing evidence. *In re Lane* (1904) 93 Minn. 425, 101 N. W. 613. On the other hand, the introduction of evidence known to be false has been held ground for disbarment. *In re Shapiro* (1911, 1st Dept.) 144 App. Div. 1, 128 N. Y. Supp. 852; (1911) 11 COL. L. REV. 589. For example, the presentation of affidavits known to be false. *In re Wharton* (1896) 114 Calif. 367, 46 Pac. 172; *In re Duncan* (1908) 81 S. C. 290, 62 S. E. 406. Or the adoption of false evidence in summing up. *In re Palmieri* (1916, 1st Dept.) 172 App. Div. 954, 162 N. Y. Supp. 799; (1917) 30 HARV. L. REV. 642. Manufacturing evidence for a divorce is ground for disbarment. *Matter of Herrmann* (1916, 1st Dept.) 175 App. Div. 310, 161 N. Y. Supp. 977. Or fraudulently obtaining an extension of time for appeal. *Matter of Cebulsky* (1915, 1st Dept.) 169 App. Div. 636, 155 N. Y. Supp. 463. Or fraudulently obtaining a judgment by default. *People v. Hooper* (1905) 218 Ill. 313, 75 N. E. 896. It is not necessary that the court be actually deceived, as the gravamen of the offense is the attorney's intent. *Matter of Goodman* (1913, 1st Dept.) 158 App. Div. 465, 143 N. Y. Supp. 577. In the instant case the fraud upon the opposing counsel as well as upon the court well warranted the disbarment.

PARTNERSHIP—INFANT PARTNER—POWER TO DISAFFIRM AND RECOVER PREMIUM OR CONTRIBUTION.—At the solicitation of an adult, an infant purchased a half interest in the former's cafe. After two months, the infant discovered it was a losing business, disaffirmed the contract of partnership, and sued the adult to recover the purchase price. *Held,* that he could recover. *Thomas v. Banks* (1923, Mich.) 195 N. W. 94.

An infant may become a partner and as such is entitled to full rights and powers over the property of the partnership. *Parker v. Oakley* (1900, Tenn. Ch.) 57 S. W. 426; Mechem, *Elements of the Law of Partnership* (2d ed. 1920) sec. 49. He may choose during minority to disaffirm the contract of partnership, and thereby avoid all personal liability both to the firm creditors, and to the adult

partner for contribution for losses. *Folds v. Allardt* (1886) 35 Minn. 488, 29 N. W. 201; Burdick, *Partnership* (3d ed. 1917) 96. The question then arises whether he can recover his premium to the adult partner for the privilege of entering, or his contribution to the partnership funds. It is well settled that his contribution remains primarily liable for firm debts. *Hill v. Bell* (1892) 111 Mo. 35, 19 S. W. 959. Where creditors are not involved, however, it seems that recovery of either premium or contribution should rest on the established principles governing executed contracts between adult and infant. Ordinarily, the infant may recover the consideration paid without a tender of the consideration received. *Gillis v. Goodwin* (1901) 180 Mass. 140, 61 N. E. 813. This is true even if he has wasted the received consideration. *Dawson v. Helmes* (1882) 30 Minn. 107, 14 N. W. 462; *First National Bank v. Casey* (1912) 158 Iowa, 349, 138 N. W. 897. But the hardship on the adult has induced a few courts to allow the infant to recover only if he puts the other party *in statu quo*. *Holmes v. Blogg* (1818, C. P.) 8 Taunt. 508; *Rice v. Butler* (1889) 160 N. Y. 578, 55 N. E. 275. The English courts early refused to allow the infant to recover from the adult partner in the absence of fraud. *Ex parte Taylor* (1856, Ch.) 8 De Gex, M. & G. 254 (premium). This seems to be the prevailing American rule. *Page v. Morse* (1880) 128 Mass. 99 (contribution); *Adams v. Beall* (1887) 67 Md. 53, 8 Atl. 664 (premium); Burdick, *op. cit.* 99. But some courts, recognizing that this is a departure from the ordinary contract rule, have allowed recovery irrespective of fraud. *Sparman v. Keim* (1880) 83 N. Y. 245 (contribution); *Kuipers v. Thome* (1913) 182 Ill. App. 28 (premium). Where the rights of third parties have not intervened, it seems that the protection with which the infant is customarily clothed should not be relaxed in this type of case.

PLEADING—NEGLIGENCE—GENERAL ALLEGATION GOOD AGAINST GENERAL DEMURRER.—In a personal injury action the complaint after alleging that plaintiff was a lawful traveler on the highway exercising due care, alleged that the defendant carelessly and negligently operated his automobile, and it collided with the defendant and injured him. No specific acts of negligence were alleged. The defendant demurred. *Held*, that the complaint was sufficient as against a general demurrer. *Couture v. Gauthier* (1923, Me.) 122 Atl. 54.

At common law a general allegation of negligence was the usual form of the declaration in case. 2 Chitty, *Pleadings* (16th ed. 1879) 574. Under code provisions, however, a plain and concise statement of the facts is required. N. Y. C. C. P. sec. 481 (2). By the great weight of authority an averment that the defendant acted "negligently" is good against a general demurrer. *Seaboard Air Line R. R. v. Good* (1920) 79 Fla. 589, 84 So. 733; Bliss, *Code Pleading* (3d ed. 1894) sec. 211 (a). And in any case its sufficiency cannot be questioned after issue joined. *Freedman v. Denhalter Bottling Co.* (1919) 54 Utah, 513, 182 Pac. 843. But it is usually subject to a motion to make more specific. *Anderson v. Denison Clay Co.* (1919) 104 Kan. 766, 180 Pac. 797; *Van Bibber v. Willman Fruit Co.* (1921, Mo. App.) 234 S. W. 356. Or a special demurrer for want of definiteness. *Silvia v. Scotten* (1921, Del. Super. Ct.) 114 Atl. 206; *contra: Saylor v. Taylor* (1919) 42 Calif. App. 474, 183 Pac. 843. But if the facts are peculiarly within the knowledge of the defendant, the plaintiff will not be required to set them up specifically. *Haskell & Barker Car Co. v. Trzop* (1920) 190 Ind. 35, 128 N. E. 401; Bliss, *op. cit.* sec. 310a. The plaintiff may set up the specific acts showing negligence without characterizing them as such. *Metcalf v. Mellon* (1920) 57 Utah, 44, 192 Pac. 676. In such a case he will be confined in his proof to the acts set up. *New England Fruit & Produce Co. v. Director General* (1922) 97 Conn. 225, 116 Atl. 243. This is so even if a general allegation of negligence is also included. *East Tennessee Coal Co. v. Daniel* (1897) 100 Tenn. 65,

42 S. W. 1062; but see *Mezzi v. Taylor* (1923) 99 Conn. 1. And if the specific acts alleged do not state a cause of action, the complaint is demurrable in spite of the general allegation. *Fuller v. Illinois Cent. R. R.* (1910) 138 Ky. 42, 127 S. W. 501. It seems reasonable that the general allegation of negligence should be held sufficient even against a motion to make more specific, unless it appears that the defendant has actually no notice of the facts. See COMMENTS (1923) 32 YALE LAW JOURNAL, 483, 489.

PROPERTY—LICENSES—REVOCABILITY AFTER EXPENDITURES BY LICENSEE.—The defendant's grantor orally allowed the plaintiff to place pipes under his land for the purpose of conveying steam and water to the plaintiff's mill. The defendant bought the land with knowledge that the plaintiff had expended considerable money in reliance on the license. The plaintiff prayed for an injunction to prevent the defendant from removing the pipes. *Held,* that a permanent injunction be granted, since the license when executed became irrevocable. *Leininger v. Goodman* (1923, Pa.) 120 Atl. 772.

The defendant's grantor orally granted the plaintiff the perpetual use of his well in consideration of the use of the plaintiff's water pressure for his mill. The defendant bought the land with knowledge that the plaintiff had constructed waterworks in reliance, and that the agreement had been acted upon by both parties for over twenty years. He further acquiesced in the user for two years and then demanded payment for the water taken during this period threatening to shut off the water unless his claim was paid. The plaintiff prayed for an injunction. *Held,* that the order below granting the injunction be reversed, since the license was revocable. *City of Hutchinson v. Wegner* (1923, Minn.) 195 N. W. 535.

It is said to be a question of fact in each case whether the parties intend to create a mere privilege with regard to land (revocable license) or a privilege plus an immunity from revocation (irrevocable easement). Hohfeld, *Fundamental Legal Conceptions* (1923) 160. If the intent was to create an easement, expenditures or substantial improvements made in reliance are sufficient to make the contract enforceable. *Alderman v. New Haven* (1908) 81 Conn. 137, 70 Atl. 626; *Clendenin v. White* (1923, Calif. App.) 217 Pac. 761. Even where a license is intended, affirmative conduct of the licensor inducing expenditures by the licensee is ground for an estoppel against revocation. *Metcalf v. Hart* (1891) 3 Wyo. 514, 27 Pac. 900; *Arthur Irrigation Co. v. Strayer* (1911) 50 Colo. 371, 115 Pac. 724; Ann. Cas. 1913 A, 74, note; see (1919) 28 YALE LAW JOURNAL, 606. But by the general rule expenditures by the licensee do not give him an immunity from revocation where the licensor has merely "stood by." *McIntyre v. Harty* (1908) 236 Ill. 629, 86 N. E. 581; *Davis v. Martin* (1910) 157 Calif. 657, 108 Pac. 866; 49 L. R. A. 497, note. This may be so even where the license has been "executed," that is, acted on by the licensee. *Pifer v. Brown* (1897) 43 W. Va. 412, 27 S. E. 399. Whether the licensor has merely "stood by" or whether he has induced expenditures in reliance is again a question of fact; hence the seeming conflict in the decisions. See Clark, *Licenses in Real Property Law* (1921) 21 COL. L. REV. 757. The growing tendency to enforce irrevocability finds an even stronger analogy in the doctrine that a promise to make a gift of land will be held specifically enforceable where in reliance the donee has been induced to make expenditures. *Messiah Home for Children v. Rogers* (1914) 212 N. Y. 315, 106 N. E. 59. It seems that there was adequate ground for a specific enforcement of the contract in the Minnesota case. Furthermore, such a contract has been treated as one for the sale of personalty, and so not within the statute of frauds. See *Mettlow Cattle Co. v. Williams* (1911) 64 Wash. 457, 117 Pac. 239 (irrigation ditch). The Pennsylvania decision is more consonant

with equitable principles in preventing an undue hardship on the licensee. See also *McLure v. Koen* (1898) 25 Colo. 284, 53 Pac. 1058; *Shaw v. Profitt* (1910) 57 Or. 192, 110 Pac. 1092.

QUASI-CONTRACTS—RECOVERY OF PAYMENT TO THIRD PARTY—MISTAKEN DUTY TO FORGER.—The plaintiff loaned money on an instrument fraudulently represented to be a first mortgage. Part of the money loaned was paid directly to the defendant to cancel a debt due from the person guilty of the fraud. Neither plaintiff nor defendant then knew of the fraud. The plaintiff secured a judgment for the amount so paid, and the defendant appealed. *Held,* that there should be no recovery. *N. Y. Title & Mortgage Co. v. Title Guarantee & Trust Co.* (1923, 1st Dept. App. Div.) 201 N. Y. Supp. 529.

Payments induced by fraud or mistake of fact may generally be recovered. *Bradshaw v. Glasscock* (1913) 91 Kan. 11, 136 Pac. 933; *Prowinsky v. Bank* (1920) 49 App. D. C. 363, 265 Fed. 1003. But where the payee uses the payment to discharge a bona fide debt to an innocent third party, the original payer cannot recover from such third party. *Holly v. Episcopal Church* (1899, C. C. A. 2d) 92 Fed. 745; *Russell v. Richard and Thalheimer* (1912) 6 Ala. App. 73, 61 So. 819. And the same rule applies where the payment is made directly to the third party in behalf of the fraudulent party. *Merchants' Insurance Co. v. Abbott* (1881) 131 Mass. 397; *Aiken v. Short* (1856, Exch.) 1 H. & N. 209; L. R. A. 1918 C, 177, note; *contra: Strauss v. Hensey* (1896) 9 App. D. C. 541. Whether such direct payment is by check or by cash is immaterial. *Swift v. Tyson* (1842, U. S.) 16 Pet. 1; *Hatch v. Fourth National Bank* (1895) 147 N. Y. 184, 41 N. E. 403. A contrary result is reached in some jurisdictions, where the third party is the payee of negotiable paper which comes into his hands indirectly through the fraudulent party. 15 A. L. R. 437, note; 21 *ibid.* 1365, note. Another class of cases denies recovery where the third party has in reliance on the payment altered his position to his detriment. *Walker v. Conant* (1888) 69 Mich. 321, 37 N. W. 292; see *Guild v. Baldridge* (1852, Tenn.) 2 Swan, 295. The instant case falls within the former rule and follows the general current of New York authority, although the earlier cases are not uniform in their concept of "value." *Lawrence v. Bank* (1873) 54 N. Y. 432; *Ball v. Shepard* (1911) 202 N. Y. 297, 95 N. E. 719.

SALES—STATUTE OF FRAUDS—ACCEPTANCE OF GOODS BY AGENT OF THE BUYER.—Pursuant to an oral contract, the plaintiff shipped goods to the defendant. A truckman who had general instructions from the defendant to receive all freight consigned to him, paid the freight charges and stored the goods in the defendant's cellar. Within a reasonable time after learning of the receipt of the goods, the defendant repudiated the sale and notified the plaintiff that the goods were held to his order. In an action for the purchase price, the verdict was for the defendant. The plaintiff appealed from a judgment on the verdict, contending that there was conclusive evidence of acceptance. *Held,* that the judgment be affirmed. *Burlington Grocery v. Greggs* (1923, Vt.) 122 Atl. 479.

Where a buyer assumes dominion over goods in a way inconsistent with an intent to reject them, there is an acceptance sufficient to take the contract out of the statute of frauds. *Wyler v. Rothchild* (1898) 53 Neb. 566, 74 N. W. 41 (execution of chattel mortgage); *Rea Implement Co. v. Smith* (1912) 167 Mo. App. 119, 151 S. W. 203 (exchange for other goods); *Isaacson v. Blum* (1919, App. T.) 178 N. Y. Supp. 333 (actual use of part). And some acts or conduct of the buyer raise a strong inference of an acceptance, which, however, may be explained. *Bicknell v. Owyhee Sheep and Land Co.* (1918) 31 Idaho, 696, 176 Pac. 782 (offer to resell); *Godkin v. Weber* (1908) 154 Mich. 207, 114 N. W. 924 (reten-

tion longer than necessary for inspection). Acceptance may be by parol statements. *Wilson v. Hotchkiss* (1915) 171 Calif. 617, 154 Pac. 1. It has been held that an acceptance before the contract is concluded is a sufficient acceptance within the statute of frauds. *Tonkelson v. Malis* (1922, App. T.) 119 Misc. 717, 197 N. Y. Supp. 309. Such an acceptance is possible even though the goods have to be weighed and measured to determine the price. *Ruediger v. Dennis* (1918) 199 Mo. App. 102, 201 S. W. 943. A few courts hold that there can be no acceptance of goods of a fungible nature where they are still to be selected from a mass. *Crawley v. Mandill* (1922, N. H.) 118 Atl. 673; *cf. contra: Kimberly v. Patchin* (1859) 19 N. Y. 330; Sales Act, secs. 4 (3), 6. Acceptance of a sample is sufficient, if taken from the bulk so as to diminish the quantity. *Dierson v. Petersmeyer* (1899) 109 Iowa, 233, 80 N. W. 389; see *Cleveland Worsted Mills v. Brownstone Co.* (1921, App. T.) 190 N. Y. Supp. 601. Where the acceptance is by agent, he must be authorized to accept. *Houghton Dutton Co. v. Engraving Co.* (1922) 241 Mass. 541, 135 N. E. 688. Such authority is not implied from an authority to receive. *Spedding v. Griggs Co.* (1917) 196 Mich. 571, 162 N. W. 956. The instant case, overruling a previous Vermont decision, is in line with the prevailing view that a carrier hired to receive goods is not *ipso facto* authorized to accept. *Strong Whitney Co. v. Dodds* (1875) 47 Vt. 348. See 35 L. R. A. (N. S.) 1038, note.

UNFAIR COMPETITION—USE OF SIMILAR PERSONAL NAMES.—The Carter Electric Company, a corporation, filed a petition in equity asking that W. B. Carter and S. E. Carter be enjoined from forming a corporation under the name of W. B. Carter Electric Company. No fraud, deception, or misrepresentation was shown. *Held,* that the injunction should be denied. *Carter v. Carter Electric Co.* (1923, Ga.) 119 S. E. 737.

Every person has the privilege of using his own name honestly in his own business, though he may thereby incidentally injure the business of another having the same name. *Silver Laundry Co. v. Silver* (1917, Mo. App.) 195 S. W. 529; Burdick, *Law of Torts* (3d ed. 1913) sec. 474. But he may not fraudulently represent his goods as those of the other. *Robinson v. Storm* (1899) 103 Tenn. 40, 52 S. W. 880. And where the name has become closely associated with products of the older firm and has thereby acquired a secondary meaning akin to a trademark, he must take affirmative measures to indicate that neither he nor his products are connected with it. *Allegretti v. Allegretti Chocolate-Cream Co.* (1898) 177 Ill. 129, 52 N. E. 487; *Chickering v. Chickering & Sons* (1914, C. C. A. 7th) 215 Fed. 490. Where in selling a business one contracts away the exclusive privilege of using his name, he is precluded from setting up a competing business under that name. *Russia Cement Co. v. LePage* (1888) 147 Mass. 206, 17 N. E. 304; *Zagier v. Zagier* (1914) 167 N. C. 616, 83 S. E. 913. Clear intent to divest himself of the privilege, however, must be shown. *Wright Restaurant Co. v. Wright* (1913) 74 Wash. 230, 133 Pac. 464; *Guth Chocolate Co. v. Guth* (1914, Md.) 215 Fed. 750, *affirmed* (1915, C. C. A. 4th) 224 Fed. 932. In any event, no injunction will be granted unless there is actual competition. *Aunt Jemima Mills Co. v. Rigney & Co.* (1916, E. D. N. Y.) 234 Fed. 804. Similar rules apply to corporations using the personal name of someone connected with it. *Bissell Chilled Plow Works v. T. M. Bissell Plow Co.* (1902, W. D. Mich.) 121 Fed. 357; *Elize Costume Co. v. Mme. Elize* (1923, 1st Dept.) 206 App. Div. 503, 201 N. Y. Supp. 545. But the courts scrutinize such transactions more carefully. Thus where a person was taken into a firm for the sole purpose of using his name in competition with another corporation having the same name, its use was enjoined. *Van Dyk Co. v. F. V. Reilly Co.* (1911, Sup. Ct. Spec. T.) 73 Misc. 87, 130 N. Y. Supp. 755. Ordinarily, even in the absence of good faith, equity will not enjoin all use of a

trade name, but merely restrict its use so as to furnish reasonable protection to the older concern. *L. E. Waterman Co. v. Modern Pen Co.* (1914) 235 U. S. 88, 35 Sup. Ct. 91; *World's Dispensary Medical Assoc. v. Pierce* (1911) 203 N. Y. 419, 96 N. E. 738. Nor will equity require proof that the public was actually deceived if, in fact, deception is likely to result. *W. F. & John Barnes Co. v. Van Dyck-Churchill Co.* (1913, S. D. N. Y.) 207 Fed. 855, *affirmed* (1914, C. C. A. 2d) 213 Fed. 637. While the courts profess to protect the public, it is in reality the plaintiff's rights that are enforced. Exact identity of names is not necessary if they are strikingly similar. *McLean v. Fleming* (1877) 96 U. S. 245 (McLane); *Stuart v. F. G. Stewart Co.* (1899, C. C. A. 7th) 91 Fed. 243. In the instant case no hardship could be shown other than mere confusion resulting from the similarity of names, and the court soundly refused an injunction.

WORKMEN'S COMPENSATION—INJURY ON WAY TO WORK NOT IN COURSE OF EMPLOYMENT.—The defendant gave to its employees the privilege of travelling to and from its mines at reduced rates. A pass was issued to each employee, the amount of the transportation charges deducted weekly from the men's salary, and an agreement signed by which the men released the railway company from all liability in case of accident. The trains were owned and operated by the railway company. The plaintiff, an employee of the defendant corporation, was injured while on his way to work and sued for recovery under the Compensation Act. The Court of Appeal held that the injury arose in the course of employment and allowed compensation. *Held,* (one judge *dissenting*) that the judgment be reversed. *St. Helens Colliery Co. v. Hewitson* (1923, H. L.) 40 T. L. R. 125.

Ordinarily an employer is not liable for injuries sustained by an employee while travelling to and from the place of employment. *Hills v. Blair* (1914) 182 Mich. 20, 148 N. W. 243. But this is not true of all injuries sustained off the employer's premises. Thus an injury sustained on the only accessible approach to the place of employment was compensated. *In re Sundine* (1914) 218 Mass. 1, 105 N. E. 433; *Cudahy Packing Co. v. Parramore* (1924, U. S.) 44 Sup. Ct. 153. And so where the employee was on his way to work in a vehicle owned by his employer. *Donovan's Case* (1914) 217 Mass. 76, 104 N. E. 431; *Tallon v. Interborough Rapid Transit Co.* (1920, 1st Dept.) 193 App. Div. 772, 184 N. Y. Supp. 588. But the majority in the instant case would have denied compensation even had the defendant owned the trains since the plaintiff was performing no duty owing to the defendant at the time the injury was sustained. The cases, however, do not seem to support this view. Thus an employee injured while on his way to work in a truck hired by the employer to carry the men to the place of employment, was allowed compensation. *Matter of Littler v. Fuller* (1918) 223 N. Y. 369, 119 N. E. 554. And so where the employee was going home in a rowboat furnished by his master. *Richards v. Morris* [1915, C. A.] 1 K. B. 221. And where the workman was walking home on his employer's railroad bed. *Wabash Ry. Co. v. Industrial Commission* (1920) 294 Ill. 119, 128 N. E. 290. Similarly where an employee on a ship fell off the dock while returning to the ship. *John Stewart & Son v. Longworth* [1917, H. L.] A. C. 249. It seems that an injury arises in the course of employment if the employee is at the time exercising a privilege peculiarly incidental to the contract of service. *A fortiori* should compensation have been allowed when the privilege of using the trains was, as pointed out by the dissent, an express part of the contract of service.